

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Open Network Architecture Tariffs
of US West Communications, Inc.

CC Docket No. 94-128

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1996; Released: February 1, 1996

By the Commission:

I. INTRODUCTION

1. In the Part 69 ONA Order, the Commission adopted rules requiring the Bell Operating Companies (BOCs) to implement an open network architecture (ONA).¹ The Commission's ONA rules require BOCs providing enhanced services to make regulated basic services available to enhanced service providers (ESPs) at the same rates, terms, and conditions that BOCs receive when using those basic services in the provision of their own enhanced

¹ Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (Part 69 ONA Order), modified on recon. 7 FCC Rcd 5235 (1992) (First Part 69 ONA Reconsideration Order), further modified on recon. 8 FCC Rcd 3114 (1993) (Second Part 69 ONA Reconsideration Order). The Bell Operating Companies include the Ameritech Operating Companies, (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West). Later, the Commission extended its ONA rules to GTE Corporation (GTE). Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, 9 FCC Rcd 4922 (1994) (GTE ONA Order).

services.² The Commission's order required the BOCs to unbundle their interstate access services in order to promote the efficient and innovative use of the network by enhanced service providers. ONA was also designed to prevent the BOCs from cross-subsidizing enhanced services with revenues from regulated services and from discriminating against independent enhanced service providers in favor of their own enhanced service operations. The Commission eventually replaced the initial system of structural separation safeguards, that were designed to prevent cross-subsidization and undue discrimination with a system of nonstructural separation safeguards.³ In its Computer III Inquiry, the Commission found that structural separation produced economic inefficiencies in the provision of enhanced services, and that ONA in conjunction with non-structural separation safeguards, by contrast, provided the same measure of protection against anticompetitive behavior without creating such inefficiencies.⁴

² Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958, 1063-64 (1986); recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Amendments of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 2 FCC Rcd 3072 (1988) (Phase II Order), recon., 3 FCC Rcd 1150 (Phase II Reconsideration), vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (Computer III Inquiry). See also GTE ONA Order, 9 FCC Rcd at 4923-24 (para. 2). The Commission's Rules define enhanced services as communications services that employ computer processing applications that act on the "format, content, code, protocol, or similar aspects of the subscriber's transmitted information." Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a). See also North American Telecommunications Association, 101 FCC 2d 349 (1985); recon. denied 3 FCC Rcd 4385 (1988). Basic services are communications services which are not enhanced.

³ Part 69 ONA Order, 6 FCC Rcd at 4525 (para. 2).

⁴ See Computer III Inquiry, 104 FCC 2d at 1011-12. In the US West ONA Designation Order, the Bureau noted that the Court had remanded the Computer III Remand Order, in which we concluded that non-structural separation accounting safeguards would be adequate to prevent cross-subsidization. Open Network Architecture Tariffs of US West Communications, Inc., CC Docket No. 94-128, 9 FCC Rcd 6710, 6710 n.4 (Com.Car.Bur. 1994) (US West ONA Designation Order), citing Computer III Remand Proceedings: Bell Operating Safeguards and Tier I Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (Computer III Remand Order); vacated in part and remanded sub nom. People of the State of California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III). The Bureau also found that the Court's remand of the Computer III Remand Order does not directly affect our investigation of US West's ONA rates. We are currently considering the issues directed to us by the Court's remand in a separate proceeding. See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, 10 FCC 8360 (1995).

2. The Part 69 ONA Order required the BOCs to file tariffs to provide ONA services. Specifically, the Commission ordered the BOCs to unbundle optional service offerings from their existing feature group access arrangements.⁵ These optional service offerings are known as basic service elements (BSEs). Basic service elements were unbundled from essential, underlying switching and transmission services offered by the BOCs, known as basic serving arrangements (BSAs).⁶ In that Order, we required all BOCs, including US West, to file tariffs offering ONA services.⁷ The Common Carrier Bureau (Bureau) suspended those rates for one day and initiated an investigation.⁸ In December 1993, we completed our investigation of all those tariffs, except for US West's tariff. For the reasons discussed below, US West was required to file revised ONA rates.⁹

3. In 1995, the U.S. Court of Appeals for the District of Columbia Circuit remanded the Part 69 ONA Order and the Second Part 69 ONA Reconsideration Order because it found that the Commission did not provide interested parties with adequate notice that it was considering either to require or permit BOCs to eliminate their feature group offerings.¹⁰ We will determine how to comply with the Court's mandate in another proceeding. We note that because the Court did not find it unreasonable to require BOCs to provide ONA services, we believe that the Court's remand does not affect the issues under investigation in this proceeding.

⁵ For a brief description of feature groups, *see, e.g.*, Open Network Architecture Tariffs of US West Communications, Inc., CC Docket No. 94-128, 9 FCC Rcd 6710, 6710 n.5 (Com. Car. Bur. 1994) (US West ONA Designation Order); National Exchange Carrier Association Tariff F.C.C. No. 5, §§ 6.5.1, 6.6.1, 6.7.1, 6.8.1.

⁶ *See* Part 69 ONA Order, 6 FCC Rcd at 4526 (para. 8).

⁷ Part 69 ONA Order, 6 FCC Rcd at 4538 (para. 81). Originally, the Commission required the BOCs to phase out their feature group offerings after their ONA tariffs had taken effect. Part 69 ONA Order, 6 FCC Rcd at 4525-26 (para. 7). We subsequently, however, permitted but did not require BOCs to continue to provide feature groups. Second Part 69 ONA Reconsideration Order, 8 FCC Rcd at 3114-16 (paras. 10-15).

⁸ Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, 7 FCC Rcd 257 (Com. Car. Bur. 1991) (Ameritech ONA Tariff Order), *modified by* Ameritech Operating Companies, 7 FCC Rcd 948 (Com. Car. Bur. 1992); Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com. Car. Bur. 1992) (ONA Investigation Order).

⁹ Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 9 FCC Rcd 440, 463 (para. 62) (1993) (ONA Final Order), *recon. denied*, 10 FCC Rcd 1619 (1995) (ONA Investigation Reconsideration Order).

¹⁰ MCI v. FCC, 57 F.3d 1136 (D.C. Cir. 1995).

4. On January 26, 1994, US West filed its revised ONA rates. The Bureau suspended those rates for one day, and initiated an investigation.¹¹ On March 8, 1995, US West filed its direct case. Two parties, AT&T Corp. (AT&T), and MCI Telecommunications, Inc. (MCI), filed comments on US West's direct case, and US West filed a reply. On August 4, 1995, MCI filed an ex parte statement addressing some of US West's reply comments.¹² For the reasons discussed below, we conclude that US West's ONA rates filed in Transmittal 446 are not unjust and unreasonable.

5. In addition, on December 8, 1994, MCI filed an application for review of the US West ONA Designation Order. US West filed an opposition to MCI's application, and MCI filed a reply. For the reasons discussed below, we deny MCI's application.

II. BACKGROUND

6. Implementing ONA requires development of reasonable basic service element rates, which in turn requires some rational means for apportioning joint and common switch investment among basic service elements. In the ONA context, the Bureau concluded that any reasonable apportionment of switching costs requires the BOCs to develop an investment cost allocation model, to enable them to allocate switch investment based on the usage of various features and functions of each switch to provide each basic service element.¹³ Therefore, the BOCs used computer models to develop the necessary investment data on which to base the unbundled basic service element rates.

7. Bell Communications Research, Inc. (Bellcore) and US West have each developed a cost model that the BOCs use to determine the investment required to produce one unit of a service. These models analyze switching equipment to determine how much investment is required to produce one unit of a particular basic service element. The BOCs then multiply that unit investment by annual direct cost factors to determine the total annual direct costs required to support their investment. Because direct costs, which are predominantly capital costs and other plant-specific costs, are closely linked to direct investment, the BOCs are able to use internal company records to develop direct cost factors that are applied to unit investment in

¹¹ US West Communications, Inc., Open Network Architecture Tariffs, 9 FCC Rcd 2522 (Com. Car. Bur. 1994) (US West ONA Suspension Order).

¹² Letter from Gregory F. Intoccia, MCI, to Steven Spaeth, Tariff Division, Common Carrier Bureau, Federal Communications Commission, dated August 4, 1995 (August 4 Letter).

¹³ Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521, 523-24 (para. 17) (Com. Car. Bur. 1991) (SCIS In Camera Order); review denied, 8 FCC Rcd 422 (1993) (SCIS In Camera Review Order).

order to determine the amount of direct costs that can be recovered from each service.¹⁴ Overhead costs are costs that are not linked to a specific service. BOCs calculate overhead costs to be recovered from a specific service by developing an overhead loading factor and applying it to direct costs.¹⁵

8. The Bureau allowed BOC ONA tariffs to take effect subject to a one day suspension and an investigation. The cost support models used by the BOCs to develop ONA cost support employ proprietary information in the form of pricing information supplied by switch vendors. Bellcore and US West also hold intellectual property rights in these cost support models.¹⁶ The Commission has determined that these models are exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (FOIA). In deciding not to disclose this information, the Commission determined that disclosure would not be in the public interest because it could cause substantial competitive harm to carriers and switch vendors and might cause switch manufacturers to stop providing this proprietary information, which would make it difficult or impossible to update the computer models to reflect changes in switch prices or development of new switching technologies. This, in turn, would render the computer models meaningless, and the Commission would be deprived of an important tool needed to evaluate ONA tariffs.¹⁷ Therefore, we developed special procedures to enable intervenors to review as much cost support as possible without disclosing proprietary information.¹⁸

9. In December 1993, the Commission completed its investigation of all the BOC ONA tariffs except US West.¹⁹ Unlike other BOCs, which used one computer model for all their basic service element rates, US West developed the costs underlying the rates in its first ONA

¹⁴ See ONA Final Order, 9 FCC Rcd at 456 (paras. 44-45). By "unit investment," we mean the investment required to produce one unit of the basic service element at issue.

¹⁵ Id.

¹⁶ SCIS In Camera Order, 7 FCC Rcd at 523 (paras. 14-16); SCIS In Camera Review Order, 8 FCC Rcd at 423 (para. 5).

¹⁷ Allnet Communications Services, Inc., FOIA Control No. 92-266, 7 FCC Rcd 6329, 6330-31 (paras. 14-17) (1992) (Allnet FOIA Review Order), aff'd. Allnet Communications Services, Inc. v. FCC, 800 F.Supp. 984 (D.D.C. 1992), aff'd. Allnet Communications Services, Inc. v. FCC, No. 92-5351, slip op. (D.C. Cir. May 27, 1994).

¹⁸ Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992) (SCIS Disclosure Order); aff'd, 9 FCC Rcd 180 (1993) (SCIS Disclosure Review Order).

¹⁹ See ONA Final Order, 9 FCC Rcd 440.

filing from two separate software models that were inconsistent with each other.²⁰ US West developed its own computer model, known as the "Switching Cost Model" (SCM), to determine its basic service element investment costs, but also relied on a 1987 version of the model used by six other BOCs, the "Switching Cost Information System" (SCIS).²¹ Because the two models did not use the same costing methodology, US West's reliance on both not only created the possibility of inconsistent cost allocations, but was also contrary to the requirements of the Part 69 ONA Order. The Commission, therefore, required US West to file replacement rates to rectify this and other problems.²²

10. On January 26, 1994, US West filed replacement ONA rates under Transmittal No. 446. Although US West relied exclusively on one computer model, a revised version of SCM,²³ it was not clear whether or how these revisions affected the unit investment figures produced by the model.²⁴ The Bureau therefore suspended Transmittal No. 446 for one day, and initiated an investigation.²⁵ In the US West ONA Designation Order, the Bureau designated several issues for investigation.²⁶ The Bureau also established special procedures that were intended to protect proprietary material without unreasonably restricting intervenors' participation in the tariff investigation.²⁷ Those procedures were substantially similar to procedures established by the Bureau and approved by the Commission in the first ONA investigation. In the US West ONA Designation Order, the Bureau required US West to hire an independent reviewer to examine SCM, and also required it to develop a redacted model that intervenors could examine pursuant to a nondisclosure agreement.²⁸

²⁰ ONA Final Order, 9 FCC Rcd at 461-62 (paras. 56-59).

²¹ Id. at 461 (para. 56).

²² Id. at 463 (paras. 61-63). For example, the Commission identified outdated factual material that US West had relied upon in its filing and required US West to update its filing. Id. at 461-62 (para. 58).

²³ US West Transmittal No. 446, Description and Justification (D&J), at 2-1.

²⁴ US West ONA Suspension Order, 9 FCC Rcd at 2522 (para. 3).

²⁵ Id.

²⁶ US West ONA Designation Order, 9 FCC Rcd 6710.

²⁷ Id. at 6714 (para. 18).

²⁸ Id. at 6714 (paras. 19-21). US West subsequently hired Arthur Andersen and Co. (Arthur Andersen). We refer to Arthur Andersen's report as the "1995 Arthur Andersen Report," to distinguish it from the reports Arthur Andersen filed in the first ONA investigation.

III. DESIGNATED ISSUES

Issue A. Has US West Corrected the Ratemaking Deficiencies Identified in the ONA Final Order With Respect to Developing Unit Investment Figures?

1. Model Office Development

11. **Background.** The SCM bases its BSE unit investment for each switch manufactured by each switch vendor on a "model office." Each model office is an average of all the existing switches of a certain type in the BOC's network.²⁹ We found in the ONA Final Order that the reasonableness of the SCM results depends in part on whether the model office is based on a representative sample of actual switches.³⁰ We also noted that US West used only central offices from its central region to develop investment for its "Make Busy Key" and its "Message Delivery" basic service elements.³¹ In the US West ONA Designation Order, the Bureau required US West to show that it included all of its central offices in developing investment costs for all of its basic service elements, or to justify why it had excluded any central offices.³²

12. **Pleadings.** US West states that it incorporated information from only 85 percent of all of the switches in service in its service area in its model office.³³ US West states that the investment information included in the model office is derived from 5ESS, DMS 100, and DMS 10 switches, and that those switches are represented in its model office in the same proportion as the lines served by each type of switch.³⁴ US West did not include 5ESS remote or DMS 100 remote switches in its model office, because most of the processing functions associated with these switches occur at the host switch, and because these remote switches make up only 8

²⁹ ONA Final Order, 9 FCC Rcd at 447 (para. 15).

³⁰ Id.

³¹ Id. at 448 (para. 18). US West's central region is the part of its service area formerly served by Mountain States Telephone and Telegraph Co. (Mountain Bell). Id. at 447 (para. 15). Message Delivery service transmits call information pertaining to all incoming calls to the customers switched access multiline hunt group. US West Tariff F.C.C. No. 1, Section 6.3.1.X. The Make Busy service provides a method for making lines appear busy to the serving wire center when they are in an idle state. This function would also allow a customer to have all incoming calls routed to another location upon activation of a CPE device. US West Tariff F.C.C. No. 1, Section 6.3.1.Z.

³² US West ONA Designation Order, 9 FCC Rcd at 6712 (para. 8).

³³ US West Direct Case at 2.

³⁴ Id.

percent of its switches.³⁵ Similarly, US West states that it did not include Ericsson AXE host or remote switches in its model because US West claims that these switches do not provide all the features that other switches do, and because these switches provide service to only 6 percent of its lines.³⁶ US West also stated that it included only digital switches in its model office.³⁷ None of the commenters challenged US West's assertions on this issue.

13. Discussion. We conclude that US West's exclusion of remote switches and the Ericsson AXE host switches from US West's SCM model office calculations is unlikely to skew the results of its study in any significant manner. The Arthur Andersen Report concluded that the switching systems included in US West's ONA tariffs "are in large part representative of [US West's] mix of technologies at the time of the filing."³⁸ We conclude, therefore, that the exclusion of remote switches and Ericsson switches does not provide an adequate basis to find that US West's ONA rates are unreasonable.

2. Outdated Traffic Studies, Vendor Operating Software, and Vendor Data

14. Background. The Commission concluded in the ONA Final Order that US West's traffic studies might not reflect current traffic patterns accurately because they were outdated.³⁹ In addition, we determined that US West's rates were unreasonable because they were based on versions of switching software and associated switch vendor data that had been superseded by newer software versions and vendor data. Therefore, we concluded that US West's ONA rates were not based on its current costs of providing service.⁴⁰

15. US West stated in its January 1994 ONA tariff filing that it updated its traffic studies, and updated SCM to reflect new switching software. US West, however, failed to describe these updates, or explain their effects on unit investments.⁴¹ Therefore, the Bureau required US West to specify the scope, date, and the procedure used to conduct its new traffic studies, and to describe the more recent vendor data and software incorporated within the updated SCM software, itemized for each switch technology. For each deficiency identified in

³⁵ Id. at 3.

³⁶ Id.

³⁷ Id. at 2.

³⁸ 1995 Arthur Andersen Report at 8.

³⁹ ONA Final Order, 9 FCC Rcd at 450 (para. 22).

⁴⁰ ONA Final Order, 9 FCC Rcd at 461-62 (para. 58).

⁴¹ See US West ONA Designation Order, 9 FCC Rcd at 6712 (para. 9).

the ONA Final Order that US West asserted it has corrected, US West was directed to show the effect of the correction on the unit investment figures developed using the updated SCM.⁴²

16. Pleadings. US West contends that over half of its traffic data comes from its Demand and Facilities (D&F) database, which stores central office traffic data and is updated twice per year.⁴³ US West also states that about a third of its traffic data came from its Trunk Forecasting System, which is updated weekly.⁴⁴ US West also maintains that its integrated services digital network (ISDN) and analog trunk forecasts were taken from special studies completed in 1993.⁴⁵ US West states that it based its 5ESS model office on 5E9 software, technology, and prices in effect on December 31, 1993. Similarly, US West asserts that it based its DMS 100 model office on BCS 35 software, technology, and prices in effect on December 31, 1993, and its DMS 10 model office on Series 400 software, technology, and prices in effect on December 31, 1993.⁴⁶

17. US West explains in detail in Appendix B to its direct case the manner in which it corrected the SCM and the SCM inputs, as required by the ONA Investigation Final Order, and the impact of these changes on its rates. The corrections US West made include: (1) making its model office representative of its entire service area, by including 85 percent of its switches in its model office calculations as discussed above; (2) using forward-looking technology; *i.e.*, excluding from its calculations costs which US West will not use to provide service in the future; and (3) updating its traffic studies as of December 31, 1993, as discussed above.⁴⁷ US West shows the effects of these corrections in its direct cost and overhead cost ratios in Appendix A to its direct case.⁴⁸ US West also states that it made a computational error in its original cost support for the rates subject to this investigation, and the effects of correcting this error are displayed in Appendix C to its direct case, Workpapers 4, 5, and 6.⁴⁹ Neither MCI nor AT&T addressed US West's assertions on this issue.

⁴² US West ONA Designation Order, 9 FCC Rcd at 6712 (para. 10).

⁴³ US West Direct Case at 3-4.

⁴⁴ Id. at 4.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id. at 5, 9-10.

⁴⁸ Id. at 6.

⁴⁹ Id. at 12-15.

18. Discussion. We have reviewed US West's updates to its SCM model. US West has shown that its model now includes current switch software, and traffic studies. We find, therefore, that US West's ONA rates are now based on its current costs of providing BSEs, and that US West has complied with this requirement of the ONA Final Order.⁵⁰

3. Inclusion of 1993 Rate Levels

19. In its cost support for its current ONA rates, US West stated that the SCM had been updated to include "1993 rate levels and traffic data," and "the most current data on switching technology."⁵¹ US West was directed to explain its statement in the Transmittal No. 446 Description and Justification that 1993 rate levels have been included in SCM. The Bureau expressed concern that US West's cost model might have been somehow modified to result in rates that US West had selected arbitrarily prior to conducting any SCM analysis.⁵² US West claims that its reference to 1993 rate levels was merely a reference to 1993 vendor prices.⁵³ Neither of the commenters responded to US West's claim. We find that US West has provided an adequate explanation, and that no refunds are warranted as a result of US West's reliance on 1993 vendor data.

Issue B. Does the Revised SCM Software Provide a Sound Methodology for Developing Reasonable Rates?

20. Background. The Bureau determined that it was unclear whether SCM, as revised, could be used to produce reasonable unit investment data on which reasonable ONA rates can be based.⁵⁴ Accordingly, the Bureau directed US West to run the same set of data through both the old and the revised SCM models, to incorporate the same model assumptions in each set, and identify any differences on unit investment outputs.⁵⁵ US West was directed to show

⁵⁰ ONA Final Order, 9 FCC Rcd at 450 (para. 23).

⁵¹ See US West ONA Designation Order, 9 FCC Rcd at 6712 (para. 9).

⁵² US West ONA Designation Order, 9 FCC Rcd at 6712 n.25.

⁵³ US West Direct Case at 6.

⁵⁴ US West ONA Designation Order, 9 FCC Rcd at 6712 (para. 11).

⁵⁵ US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 12). Regarding the "assumptions," the Bureau explained that the equations within the SCM model include variables that enable US West to adjust the model to fit assumptions it makes concerning its network. Many of these assumptions are similar to the assumptions one can make using SCIS, such as average investment or marginal investment, cost of money, or switch exhaustion. See US West ONA Designation Order, 9 FCC Rcd at 6713 n.29. For a more detailed discussion of these assumptions, see ONA Investigation Order, 7 FCC Rcd at 1514-15 (paras. 10-16).

the effect of any SCM software revisions, any changes in SCM assumptions, and any other sources of variation on unit investments.⁵⁶ The Bureau also required an independent reviewer to examine US West's comparison of old and new SCM.⁵⁷

21. Pleadings. In Appendix B to its direct case, US West compares the results produced by the SCM model it used in the first ONA investigation with the results produced by the revised SCM it used for the rates subject to this investigation, for six of the seven BSEs for which it used the SCM in the first ONA investigation. US West explains that it did not make this comparison for Called Directory Number Delivery (CDND) because it mistakenly used unit investment data for DID Trunk Termination in the first ONA investigation.⁵⁸ US West also argues that Arthur Andersen found SCM to be reasonable in both its 1992 and 1995 reports, and that no further inquiries into SCM should be necessary.⁵⁹

22. Based on the redacted 1995 Arthur Andersen Report, AT&T argues that there are still unresolved problems with SCM that US West has not explained or justified.⁶⁰ AT&T points out that changes in the consumption rate (e.g., time per attempt or time per call) have significant effects on BSE unit investment.⁶¹ AT&T and MCI also argue that a number of functional category unit investments, which are used to calculate BSE unit investments, are significantly affected by changes in variables such as 100 call seconds (CCS) per line, calls per working line, line concentration ratios, and number of working lines and trunks.⁶²

23. MCI and AT&T also note that Arthur Andersen found that SCIS and SCM produce highly different BSE unit investments.⁶³ AT&T also observes that SCIS and SCM use similar processes to develop unit investments.⁶⁴ AT&T argues that, unless US West can provide persuasive justifications for the discrepancies in the two models' outputs, US West has failed to

⁵⁶ US West ONA Designation Order, 9 FCC Rcd at 6712-13 (para. 12).

⁵⁷ Id. at 6713 (para. 13).

⁵⁸ US West Direct Case at 7-9.

⁵⁹ US West Direct Case at 15-16.

⁶⁰ AT&T Opposition at 4.

⁶¹ AT&T Opposition at 4-5.

⁶² AT&T Opposition at 5 and n.9; MCI Opposition at 23.

⁶³ MCI Opposition at 23-24; AT&T Opposition at 6.

⁶⁴ AT&T Opposition at 6, citing ONA Final Order, 9 FCC Rcd at 451-52 (paras. 26-29).

demonstrate that its tariffs are reasonable.⁶⁵ MCI contends that US West's current ONA rates are in most cases lower than the rates in its first ONA filing were, but cannot determine the source of these changes or verify their accuracy.⁶⁶

24. US West contends that SCM produces reasonable results, regardless of whether it produces results different than SCIS.⁶⁷ US West also observes that SCIS did not produce identical results for six other BOCs, and contends that its ONA rates in many cases are not substantially different from the rates of those other carriers.⁶⁸

25. Discussion. AT&T and MCI are correct that SCIS and SCM produce different results. Arthur Andersen compared SCM and SCIS results for four BSEs and two switching technologies, for a total of eight comparisons. Arthur Andersen found that, in five cases, SCIS unit investments were substantially greater than those of SCM. The SCIS unit investment was much lower than the SCM unit investment in one case, and the unit investments were within 20 percent of each other in the remaining two cases.⁶⁹

26. We disagree with AT&T's and MCI's assertions, however, that SCM is an unreasonable model unless US West can explain the discrepancies between SCM and SCIS outputs. Although we have found that SCIS has no substantial defects that would preclude its use for developing ONA rates,⁷⁰ there is no evidence either in this investigation or in the first ONA investigation that would support a conclusion that SCIS is the only possible reasonable computer cost allocation model. In the ONA Final Order, we found that SCIS unit investment studies based on marginal investment and average investment are both reasonable, and that carriers should be permitted to use either method, in spite of the fact that marginal and average investment studies produce different results.⁷¹ We thus find that SCM cannot be considered unreasonable simply because it produces results that differ from SCIS results.

27. AT&T and MCI are also correct that changes in the consumption rate and changes in variables measuring usage, such as CCS per line, calls per working line, line concentration

⁶⁵ AT&T Opposition at 6-7. See also MCI Opposition at 24.

⁶⁶ MCI Opposition at 24-25.

⁶⁷ US West Reply at 17-18.

⁶⁸ US West Reply at 18.

⁶⁹ 1995 Arthur Andersen Report at 7.

⁷⁰ ONA Investigation Order, 7 FCC Rcd at 1514 (para. 9); ONA Final Order, 9 FCC Rcd at 471 (paras. 82-83).

⁷¹ ONA Final Order, 9 FCC Rcd at 451-53 (paras. 26-34).

ratios, and number of working lines and trunks, have significant effects on BSE unit investment calculations produced by the SCM. Such variation by itself, however, does not establish the invalidity of the SCM model. We originally adopted a "flexible cost-based approach" for ONA rate development, in order to encourage carriers to develop innovative new services.⁷² In the ONA Final Order, we sought to limit carrier discretion in rate development only to the extent necessary to prevent unreasonable or discriminatory rates, not to eliminate the flexibility we established in the Part 69 ONA Order.⁷³ As a result, the sensitivity in the SCM model, while generated in part by usage-related factors rather than investment costs, does not by itself show that the SCM model cannot be used to develop reasonable ONA rates.

28. Furthermore, Arthur Andersen found that US West's SCM model provides a logical methodology for estimating the total cost or total investment of a switching system and apportioning this cost among the functions performed by the switching system.⁷⁴ In any case, it appears that the sensitivity of SCM outputs to changes in consumption rates and usage variables is no greater than the sensitivity of SCIS outputs to such changes.⁷⁵ Accordingly, we find that the variability in SCM emphasized by MCI and AT&T does not lead us to conclude that SCM cannot be used to produce reasonable ONA rates.

Issue C. Has US West Complied with the Instructions of the ONA Final Order?

1. Inclusion of Analog Switch Equipment

29. Each BSE rate is based on a weighted average of the costs of providing the service through use of different kinds of switches in a BOC's network.⁷⁶ An important issue in the first ONA investigation was whether it was reasonable to include the costs of analog switches

⁷² Part 69 ONA Order, 6 FCC Rcd at 4531 (para. 41).

⁷³ ONA Final Order, 9 FCC Rcd at 445-46 (paras. 11-12).

⁷⁴ 1995 Arthur Andersen Report at 13.

⁷⁵ July 1992 Arthur Andersen Report at 78-90 (showing the variance in unit investments resulting in different usage assumptions by the six BOCs using SCIS, as well as variance from other sources, for four BSEs). See also ONA Final Order, 9 FCC Rcd at 472 (para. 84) (rate variation between carriers resulting in changes in demand is not by itself indicative of unreasonable rates).

⁷⁶ ONA Investigation Order, 7 FCC Rcd at 1515 (paras. 17-18). See also US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 14).

in this weighted average.⁷⁷ In other words, carriers must base their ONA rates on the mix of switch types they expect to use in the future. In the ONA Final Order, the Commission prescribed use of prospective switch investment to set rates. We also allowed analog switch investment to be included as part of the carrier's switch technology mix only to the extent those switches will be in service in the future, and required carriers to explain the basis for including that equipment.⁷⁸ US West was required to describe any analog equipment included in its mix of switches used to develop its model for ratemaking purposes. If analog equipment is included, then US West was required to explain the procedure it used to develop analog unit investment data for basic service elements, and justify its inclusion of analog technology in the forward-looking mix of switch technologies.⁷⁹

30. US West states that it included only digital equipment in its technology mix.⁸⁰ Accordingly, we find that US West's inclusion of exclusively digital equipment in its technology mix complies with the ONA Final Order, and is reasonable.

2. Excessive Direct Costs and Overhead Costs

31. Background. In the ONA Final Order, we found that US West, among other BOCs, had not adequately justified the direct and overhead costs on which it based its ONA rates.⁸¹ The Commission, therefore, required US West to explain how it calculated its direct costs and overhead costs. We also stated that we would resort to calculating an upper limit for these costs based on Automated Reporting Management and Information System (ARMIS) data if US West failed to provide adequate explanations.⁸² Rather than develop its own cost support mechanism for "loading" administrative costs onto direct costs associated with basic service elements, US West decided to use the Commission's default approach by using the direct costs and overhead loadings based on ARMIS data.⁸³ In the ONA Final Order, however, the Commission did not

⁷⁷ Open Network Architecture Tariffs of Bell Operating Companies, Order Terminating Investigation, CC Docket No. 92-91, 7 FCC Rcd 2604, 2605 (Com. Car. Bur. 1992) (ONA Designation Order). See also US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 14).

⁷⁸ ONA Final Order, 9 FCC Rcd at 456 (para. 41-43). See also US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 14).

⁷⁹ US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 15).

⁸⁰ US West Direct Case at 9-10.

⁸¹ ONA Final Order, 9 FCC Rcd at 458 (paras. 49-50).

⁸² *Id.* at 458 (para. 50). ARMIS is a database established by the Commission that requires LECs to report detailed investment and expense information on a regular basis.

⁸³ US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 17).

conclude that the use of ARMIS-based direct cost and overhead factors was reasonable in all cases; it merely found that ARMIS figures could be used to establish reasonable upper limits in the absence of reliable carrier-provided data. Accordingly, the Bureau required US West to either justify in detail its reliance on this approach, or use traditional cost methods to calculate direct costs.⁸⁴ US West was also required to provide an explanation for any direct costs that exceed the ARMIS-based upper limit.⁸⁵

32. Pleadings. US West states that the Commission found in the ONA Investigation Final Order that ARMIS-based ratios would be reasonable upper limits for direct costs and overheads.⁸⁶ US West claims that none of its direct costs and overheads exceeds these ratios.⁸⁷ US West's ARMIS-based direct cost factor is 0.2501, and its ARMIS-based overhead cost factor is 1.9425.⁸⁸ Neither MCI nor AT&T addressed US West's direct cost or overhead loadings.

33. Discussion. US West's direct cost and overhead loading factors are lower than those used in its original ONA tariff filing. In addition, those factors are not significantly different from the direct cost and overhead loading factors US West uses for other switched access services. Neither our review nor the record before us in this investigation provides any basis for prescribing lower direct cost or overhead factors for US West. Accordingly, we find that US West has complied adequately with our directions in the ONA Investigation Final Order regarding direct costs and overheads, and therefore these direct cost and overhead loadings are not unreasonable.

IV. REASONABLENESS OF PROTECTIONS FOR PROPRIETARY INFORMATION

A. Background

34. Because this investigation required examination of proprietary information similar to that submitted in the first ONA investigation, the Bureau established procedures to protect that proprietary information similar to those used in the first ONA investigation.⁸⁹ Specifically, the Bureau required US West to designate an independent auditing firm to review the proprietary materials, and to develop a redacted model could be made available to the intervenors pursuant

⁸⁴ US West ONA Designation Order, 9 FCC Rcd at 6713 (para. 17).

⁸⁵ Id.

⁸⁶ US West Direct Case at 10.

⁸⁷ Id. at 10-11 and App. C.

⁸⁸ Id. at 11-12 and App. C.

⁸⁹ US West ONA Designation Order, 9 FCC Rcd at 6714 (para. 18).

to a nondisclosure agreement.⁹⁰ The Bureau stated that the redacted SCM should at minimum enable intervenors to examine the effects of changes in SCM inputs on SCM outputs, just as intervenors were able to do with the SCIS Redaction II, used in the first ONA investigation.⁹¹ The Bureau also determined that the nondisclosure agreement should not be more restrictive on intervenors than the agreement governing intervenors' examination of SCIS Redaction II.⁹²

35. In its application for review of the US West ONA Designation Order, MCI argued that the protections for confidential information adopted in that Order were unreasonably restrictive. MCI raised similar issues in its opposition to US West's direct case. We consider these issues below.

B. Reliance on Undisclosed Data

36. Pleadings. MCI maintains that the procedures in this investigation are unreasonable for the reasons set forth in its petitions for reconsideration of the ONA Final Order and the SCIS Disclosure Review Order.⁹³ According to MCI, reliance on any cost support information that is not publicly available violates the Communications Act and the Administrative Procedure Act (APA).⁹⁴ MCI observes that Sections 203 and 412 of the Communications Act define tariffs as public documents, and that Section 61.49 of the Commission's Rules, 47 C.F.R. § 61.49, establish cost support requirements for price cap LECs.⁹⁵

⁹⁰ US West ONA Designation Order, 9 FCC Rcd at 6714 (para. 18).

⁹¹ US West ONA Designation Order, 9 FCC Rcd at 6714 (para. 20). The SCIS Disclosure Order required BOCs to make a redacted version of SCIS available to intervenors in the first ONA investigation. SCIS Disclosure Order, 7 FCC Rcd at 1536 (para. 55). Because some intervenors claimed that the first redacted SCIS model that Bellcore provided was so deeply redacted as to be deficient, the Bureau informally encouraged Bellcore and switch manufacturers to develop a second redacted SCIS model. See Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Tariffs, 7 FCC Rcd 5307 (Com. Car. Bur. 1992); ONA Final Order, 9 FCC Rcd at 468 n.149. The Commission referred to this second model as "SCIS Redaction II."

⁹² US West ONA Designation Order, 9 FCC Rcd at 6714 (para. 20).

⁹³ MCI Opposition at 25-26.

⁹⁴ MCI Opposition at 26-27; MCI Application at 8, citing *U.S. Lines v. FMC*, 584 F.2d 519 (D.C. Cir. 1978); August 4 Letter at 5.

⁹⁵ MCI Opposition at 27 n.42. MCI also cites Section 61.38 as establishing cost support requirements for "dominant carriers." Section 61.38 does not apply to price cap carriers, however. See Section 61.38(a) of the Commission's Rules, 47 C.F.R. § 61.38(a).

37. MCI equates reliance on any non-public information with denial of effective participation in the investigation by interested parties.⁹⁶ MCI cites US Lines and Sea-Land for the proposition that reliance on undisclosed data violates due process requirements and Section 204 of the Communications Act.⁹⁷ MCI also contends that reliance on undisclosed data is arbitrary and capricious because it precludes adversarial discussions among interested parties.⁹⁸ According to MCI, the Commission cannot determine whether ONA rates are reasonable without participation from intervenors.⁹⁹ Finally, MCI cites Portland Cement for the proposition that the Commission's refusal to respond to criticisms of its methodology is a "critical defect" in the decision-making process.¹⁰⁰

38. According to US West, MCI does not argue that US West was required to submit the SCM to support its ONA rates, but rather that the Commission may not withhold the SCM from MCI if the Commission reviews the SCM. US West argues that this reasoning could result in depriving the Commission from obtaining confidential information during tariff proceedings in the future.¹⁰¹ US West contends that US Lines is not applicable here, because US Lines concerned granting a carrier an exemption from the antitrust laws rather than a tariff proceeding.¹⁰² US West argues that the Commission is required to place in the record only the material on which it relies in making its decision.¹⁰³ US West also argues that the tariff review process is not the same as an audit which would require it to submit all of its books of account. US West contends, however, that even those books would receive confidential

⁹⁶ MCI Opposition at 27-28.

⁹⁷ MCI Opposition at 28, citing US Lines v. FMC, 584 F.2d 519 (D.C. Cir. 1978) (US Lines); Sea-Land Services, Inc. v. FMC, 653 F.2d 544 (D.C. Cir. 1981) (Sea-Land).

⁹⁸ MCI Opposition at 28-29, citing US Lines, 584 F.2d at 533-35; Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied 434 U.S. 829 (1977) (HBO v. FCC).

⁹⁹ MCI Application at 7-8, MCI Opposition at 29, citing American Lithotripsy Society v. Sullivan, 785 F. Supp. 1034 (D.D.C. 1992) (American Lithotripsy).

¹⁰⁰ MCI Opposition at 29 n.47, citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974) (Portland Cement).

¹⁰¹ US West Reply at 12-13.

¹⁰² US West Reply at 13-14.

¹⁰³ US West Reply at 14-15, citing Amendment of Part 15 to Redefine and Clarify the Rules Governing Restricted Radiation Devices and Low Power Communications Devices, Docket No. 20780, 79 FCC 2d 28, 77 (1977); Applications of General Telephone and Electronics Corporation to Acquire Control of Telenet Corporation and its Wholly-owned Subsidiary Telenet Communications Corporation, 84 FCC 2d 18, 21 (1979).

treatment.¹⁰⁴ Finally, US West contends that acceptance of MCI's legal interpretation would place proprietary information at risk any time a tariff is filed. US West denies that MCI has a right to examine proprietary cost support information.¹⁰⁵

39. MCI replies that, on the basis of the arguments advanced in its applications for review of the SCIS Disclosure Review Order, the SCIS Disclosure Order was wrongly decided and should be reversed.¹⁰⁶ MCI also distinguishes information submitted in support of an initial tariff filing from information submitted during a subsequent tariff investigation. MCI notes that an initial decision to allow a tariff to take effect does not constitute a final finding on whether the tariff is lawful.¹⁰⁷ MCI argues that an Order terminating a tariff investigation is a final, appealable Order, and therefore intervenors have a greater procedural interest in the outcome of investigations than they do prior to the effectiveness of the tariff.¹⁰⁸ MCI also contends that US West has not adequately distinguished the cases cited by MCI that hold that an agency should not base its decisions on information that was not available to opposing parties in the proceeding.¹⁰⁹

40. Discussion. MCI's reliance on Sections 203 and 412 of the Communications Act, and Section 61.49 of the Commission's Rules is misplaced. Sections 203 and 412 of the Communications Act require carriers to make rates for common carrier services publicly available. These provisions, however, do not specify, or even address, the underlying cost support for those rates. Section 61.49 of the Commission's Rules specifies cost support requirements for price cap new service filings, but does not specify under what conditions that cost support must be made publicly available. Disclosure of cost support information is governed by Sections 0.455(b)(11), 0.457(d), and 0.459, which state that cost support information shall be "routinely" publicly available, unless the cost support information is considered proprietary under FOIA Exception 4.¹¹⁰ As we noted above, SCIS and SCM have

¹⁰⁴ US West Reply at 15-16, citing Section 220(e) of the Commission's Rules, 47 U.S.C. § 220(e).

¹⁰⁵ US West Reply at 16-17.

¹⁰⁶ MCI Reply at 2.

¹⁰⁷ MCI Reply at 2-3; citing *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234-35 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).

¹⁰⁸ MCI Reply at 3-4.

¹⁰⁹ MCI Reply at 4-5.

¹¹⁰ Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d), citing FOIA Exception 4, 5 U.S.C. § 552(b)(4); Sections 0.455 and 0.459, of the Commission's Rules, 47 C.F.R. §§ 0.455, 0.459.

been found subject to FOIA Exception 4.¹¹¹ Thus, we find that MCI misinterprets the Communications Act and our Rules to require more extensive SCM disclosure.

41. Furthermore, we noted in the ONA Final Order that "the Administrative Procedure Act does not require that every bit of background information used by an administrative agency be published for public comment," as long as data sufficient to support the agency's actions were available to petitioners for comment.¹¹² We conclude that data sufficient to support our actions were made available to intervenors, and that the cases that MCI relies upon do not provide a sufficient basis to question that conclusion. Furthermore, we previously have considered MCI's claim that the Commission may not rely on undisclosed data in tariff investigations. In the ONA Investigation Reconsideration Order, we explained that, in each of the cases cited by MCI to support its claim, the agency decision under review failed to withstand judicial review because the agency either had failed to present any of its analysis to the public for comment, or had released that analysis after the pleading cycle was closed.¹¹³ As in the ONA Investigation Reconsideration Order, we find that the holdings in the cases cited by MCI do not apply to this investigation, because the record available to the parties for comment was fully sufficient to support our conclusions. Moreover, MCI was afforded an opportunity to fully utilize the SCM model without compromising proprietary data, and was able to include this analysis in its comments in the investigation.

¹¹¹ Allnet FOIA Review Order, 7 FCC Rcd 6329.

¹¹² ONA Final Order, 9 FCC Rcd at 444 n.16; see also B.F. Goodrich Co. v. Dept. of Transportation, 541 F.2d 1178, 1184 (6th Cir. 1976) (the Administrative Procedure Act does not require that every bit of background information used by an agency be published for comment where the basic data upon which the agency relied was available for comment), cert. denied, 430 U.S. 930 (1977); In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1354 n.9 (D.C. Cir. 1980) (citing B.F. Goodrich); Association of Data Processing v. Board of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984) (noting that "on the record" standard does not apply to informal rulemaking or adjudication).

¹¹³ ONA Investigation Reconsideration Order, 10 FCC Rcd at 1625 (para. 34) and n.39 ("American Lithotripsy remanded an agency's decision because the agency had not presented any of its own analysis to the public for comment, and did not provide any opportunity for comment. Similarly, in Portland Cement, the court concluded that EPA's failure to release the details of emission tests until after comments were due in the rulemaking was arbitrary and capricious. American Lithotripsy and Portland Cement are both distinguishable from the ONA investigation because MCI was given an opportunity to examine the SCIS model to the extent possible without compromising proprietary data, and was able to include its analysis in its comments in the investigation.")

C. Nondisclosure Agreement

42. Pleadings. MCI maintains that the disclosure standards specified in the US West ONA Designation Order do not permit full participation in the investigation.¹¹⁴ With regard to the nondisclosure agreement, MCI argues that it is unreasonable to limit access to the redacted SCM model to one attorney and two consultants, to restrict copying of computer data, to restrict communications between intervenors, and to limit intervenors to examining one switch type.¹¹⁵ MCI also objects to the application of those restrictions to the Arthur Andersen Report.¹¹⁶ MCI argues that these restrictions are especially unreasonable in this investigation because US West initially expressed no opposition to modifying some of these restrictions in the first ONA investigation.¹¹⁷ MCI denies that SCIS Redaction II permitted intervenors to conduct sensitivity analyses, *i.e.*, to see the effect of changes in SCIS inputs on SCIS outputs.¹¹⁸ MCI also argues that these procedures are inconsistent with the procedures the Commission adopted to protect proprietary information in formal complaint proceedings.¹¹⁹ MCI criticizes US West's nondisclosure agreement because it did not identify material that would warrant proprietary treatment, did not provide for electronic print capability at the review site, and prohibited intervenors from removing material from the review site.¹²⁰ MCI denies that these protections are necessary to protect any legitimate interest on US West's part.¹²¹

¹¹⁴ MCI Application at 3-4. MCI states that it discussed its arguments in more detail in prior pleadings, such as, *inter alia*, its petitions for reconsideration of the SCIS Disclosure Review Order and the ONA Final Order. MCI attaches those pleadings as Appendices A-G of its application for review of the US West ONA Designation Order.

¹¹⁵ MCI Application at 4-5; MCI Opposition at 16-17; August 4 Letter at 1.

¹¹⁶ MCI Application at 4-5.

¹¹⁷ Id.

¹¹⁸ MCI Application at 6-7.

¹¹⁹ MCI Opposition at 16; MCI Application at 6, *citing* Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 8 FCC Rcd 2614 (1993) (Formal Complaint Order). See Section 1.731 of the Commission's Rules, 47 C.F.R. § 1.731.

¹²⁰ MCI Opposition at 16-17.

¹²¹ August 4 Letter at 1.

43. US West maintains that the Commission considered and rejected MCI's contentions in the first ONA investigation.¹²² US West argues that the information sought by MCI is proprietary, and alleges that MCI's information request is essentially motivated by its desire to gain a competitive advantage in its plans to enter the local exchange market.¹²³

44. US West argues that the US West ONA Designation Order established reasonable protections for highly sensitive commercial information, and that the Commission has considered and rejected MCI's arguments in prior proceedings.¹²⁴ US West also asserts that private parties do not have a constitutional right to see confidential information submitted in support of a tariff.¹²⁵ According to US West, "[t]he Commission must recognize that, at least as long as it requires cost support for tariff filings, competitively sensitive information will increasingly be filed with tariffs -- on a routine basis."¹²⁶

45. Discussion. We agree with MCI that intervenor participation is an important element in any tariff investigation. Interested parties can contribute experience and resources to the analysis of rates that are not otherwise available to the Commission, thus improving the accuracy of the rates and benefiting the public.¹²⁷ MCI is mistaken, however, in maintaining that the protections for proprietary information adopted for this investigation precluded adequate intervenor participation.

46. We considered and rejected many of the arguments MCI raises here in the ONA Investigation Reconsideration Order or prior Orders.¹²⁸ Specifically, we concluded in the SCIS Disclosure Review Order that the "one attorney, two expert" restriction did not unreasonably limit intervenors' participation in the ONA investigation.¹²⁹ We also determined in the ONA

¹²² US West Reply at 3.

¹²³ US West Reply at 3-4.

¹²⁴ US West Opposition at 1-2.

¹²⁵ Id. at 2-4, citing American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).

¹²⁶ Id. at 3.

¹²⁷ See 800 Database Access Tariffs and the 800 Service Management System Tariff, CC Docket No. 93-129, 9 FCC Rcd 715, 718 (para. 11) (Com. Car. Bur. 1994).

¹²⁸ ONA Investigation Reconsideration Order, 10 FCC Rcd 1619.

¹²⁹ SCIS Disclosure Review Order, 9 FCC Rcd at 181-82 (paras. 8-9). See also ONA Investigation Reconsideration Order, 10 FCC Rcd at 1621-22 (para. 16).

Investigation Reconsideration Order that SCIS Redaction II did enable intervenors to observe the effects of changing model inputs on the model outputs.¹³⁰ Accordingly, MCI has not persuaded us that the US West ONA Designation Order nondisclosure restrictions precluded any intervenor from participating effectively in this investigation.

47. We also disagree with MCI that the Formal Complaint Order, which among other things, adopted a rule governing proprietary information in complaint proceedings,¹³¹ governs our treatment of SCM in this tariff investigation proceeding. Furthermore, our treatment of SCM in this investigation would not be precluded even if it were governed by the Formal Complaint Order. In that Order, we recognized that there might be "extremely limited circumstances" in which Section 1.731 would not be sufficient to protect certain confidential materials. We concluded that in those cases, parties could decline to comply with the request for discovery, and we would address the issue of whether the protections in Section 1.731 are adequate in deciding whether to grant or deny a motion to compel discovery.¹³² This is essentially what the Bureau did in the SCIS In Camera Order and prior proceedings. Specifically, the Bureau directed the BOCs to disclose SCIS,¹³³ and BOCs filed petitions for waiver of that requirement. In the SCIS In Camera Order, the Bureau found that the BOCs had adequately shown that unrestricted SCIS disclosure could, *inter alia*, damage competition in the switch manufacturing market, and accordingly, granted the BOCs' waiver requests.¹³⁴ Later, in the SCIS Disclosure Order, the Bureau developed procedures that enabled intervenors to examine the SCIS model without compromising proprietary information. We see no relevant distinction between the SCIS Disclosure Order and an Order considering a motion to compel discovery in a complaint proceeding, concluding that Section 1.731 would not be sufficient to protect the proprietary information in that "extremely limited circumstance," and establishing additional protections for that proprietary information that would enable a party in the complaint proceeding to examine that material. Therefore, we find that the Bureau's actions the SCIS Disclosure Order and the US West ONA Designation Order are not inconsistent with our Formal Complaint Order.

48. In reaching these conclusions, however, we place no weight on US West's assertion that our cost support requirements compel LECs to support their tariff filings with proprietary information "on a routine basis," either now or in the future. In fact, US West's contention is

¹³⁰ ONA Investigation Reconsideration Order, 10 FCC Rcd at 1622 (paras. 17-18).

¹³¹ See Section 1.731 of the Commission's Rules, 47 C.F.R. § 1.731.

¹³² Formal Complaint Order, 8 FCC Rcd at 2622 (para. 44).

¹³³ Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682, 5682 n.9 (Com. Car. Bur. 1991) (ONA TRP Order); review denied, 7 FCC Rcd 4229 (1992).

¹³⁴ SCIS In Camera Order, 5 FCC Rcd at 523 (paras. 14-15).

clearly inconsistent with the Commission's rules and prior orders. Section 0.455(b)(11) of the Commission's Rules, 47 C.F.R. § 0.455(b)(11), requires that tariffs and "all documents filed in connection therewith" shall be routinely publicly available. In the ONA Final Order, we concluded that proprietary cost support information was "necessary in the ONA context," but emphasized that "carriers should not routinely support proposed rates through the use of proprietary models or data," and that carriers relying on proprietary cost support data "bear a substantial, initial burden of demonstrating the circumstances that preclude reliance on publicly available data."¹³⁵ Thus, contrary to US West's assertion, proprietary cost support information will not be "routinely" accepted. At minimum, carriers are required to show that it is impossible to support their tariffs with publicly available information before we will permit carriers to rely on proprietary data.¹³⁶

D. Reasonableness of Conditions Under Which Intervenors Examined the Redacted Model

49. Pleadings. MCI states that it has previously explained in a letter dated March 17, 1995, the level of access to the SCM it considers appropriate.¹³⁷ In that letter, MCI argued that: (1) the redacted SCM Model should be a "complete, functioning, unaltered" version of the model, with proprietary information merely "masked," *i.e.*, included in the model, but not displayed on the computer screen in any way; (2) MCI should be given access to SCM documentation, with only vendor-specific proprietary information redacted; (3) the input display screens and instructions for acceptable ranges of inputs should not be altered; and (4) the model inputs used by US West should be included, so that MCI could use US West's inputs as a "baseline" for its sensitivity analyses.¹³⁸

50. MCI also complained that a US West representative observed MCI's SCM examination, and claims that this prevented MCI's attorney from having confidential communications with his clients.¹³⁹ US West states that, although a US West person was present while MCI was examining the redacted SCM model, a private conference room adjacent to the computer room was made available to MCI.¹⁴⁰ MCI responds that the room US West

¹³⁵ ONA Final Order, 9 FCC Rcd at 469 n.163. See also SCIS Disclosure Review Order, 9 FCC Rcd at 181 n.17; US West ONA Designation Order, 9 FCC Rcd at 6714 n.39.

¹³⁶ ONA Final Order, 9 FCC Rcd at 444 (para. 8).

¹³⁷ MCI Opposition at 6-7 and Exh. A. MCI attaches the March 17 Letter to its Opposition as Exhibit A. Letter from Gregory F. Intoccia, MCI, to Robert B. McKenna, US West, March 17, 1995 (March 17 Letter).

¹³⁸ MCI Opposition, Exh. A at 1-2.

¹³⁹ MCI Opposition at 17.

¹⁴⁰ US West Reply at 5-6.

made available was a break room which did not afford sufficient privacy to conduct sensitive conversations.¹⁴¹

51. MCI further claims that US West refused to provide the SCM documentation it requested.¹⁴² MCI also asserts that, when it tried to operate the redacted model, the model generated a "fatal error" message and stopped working. MCI states it received "fatal error" messages twice on March 22, 1995, and once on March 27, 1995. MCI asserts that US West informed MCI that the errors were caused by the redaction process rather than being inherent in the model.¹⁴³ MCI speculates that in addition to the "fatal errors" it did discover, there may have been other "non-fatal errors" which call into question the accuracy of the redacted model outputs.¹⁴⁴ MCI also asserts that it obtained anomalous results in its SCM examination, but does not specify what those anomalous results were.¹⁴⁵

52. MCI states that on March 28, 1995, it conducted more sensitivity analyses, by changing the value of a variable at each switching location, but found that process to be "unworkable."¹⁴⁶ Nevertheless, on May 3, MCI examined redacted SCM again by changing one variable at each switching location.¹⁴⁷ MCI maintains that the redaction caused this to be a burdensome process.¹⁴⁸ MCI alleges that, because it was required to use US West's master file, changing a variable at each switching location required 12 to 15 minutes for each run. At this rate, MCI contends that it would have taken approximately 27 to 37 weeks for MCI to conduct a sensitivity analysis of 25 to 30 variables at each switching location.¹⁴⁹ MCI considers it "untenable" to base its analysis on a single switching location, because that office may not be representative of all US West switching locations.¹⁵⁰

¹⁴¹ August 4 Letter at 2.

¹⁴² MCI Opposition at 7.

¹⁴³ MCI Opposition at 7-9.

¹⁴⁴ MCI Opposition at 12-13, 19-20; August 4 Letter at 3-4.

¹⁴⁵ August 4 Letter at 3.

¹⁴⁶ MCI Opposition at 9.

¹⁴⁷ Id. at 9-10.

¹⁴⁸ Id. at 10.

¹⁴⁹ MCI Opposition at 10-11, 18, August 4 Letter at 4. In Exhibit B of its opposition, MCI reports the amount of time consumed by each run. Based on MCI's Exhibit B, it appears that most if not all of MCI's runs lasted three or four minutes rather than 12 to 15 minutes.

¹⁵⁰ MCI Opposition at 18-19; August 4 Letter at 3.

53. MCI alleges that US West removed the feature from SCM that would enable intervenors to select switching locations based on common characteristics, and that this caused the redacted model to run more slowly than it would have otherwise.¹⁵¹ Similarly, MCI claims that US West's inclusion of additional master files increased SCM running time.¹⁵² MCI criticizes US West for making only the "cost study" output report available, rather than the more extensive "investment analysis" output report.¹⁵³ MCI claims that some sensitivity to input variation does exist, but alleges that it is unable to quantify that sensitivity using the redacted model.¹⁵⁴ MCI also alleges that the Arthur Andersen Report is too heavily redacted to enable it to comment on Arthur Andersen's methodology or results.¹⁵⁵

54. US West denies that it has been "anything less than open and accommodating" to MCI. US West notes that its technician once flew from Denver to Washington for an appointment that MCI had made to examine the redacted model, but MCI failed to keep that appointment.¹⁵⁶ US West states that the two fatal errors consisted of a file-naming convention error and an error involving the size of a file. US West contends that the revisions causing these errors only masked proprietary data, but had no effect on the model outputs.¹⁵⁷ US West argues that, based on the redacted 1995 Arthur Andersen Report, MCI should have known that it would have been more reasonable and less time-consuming to test feature input sensitivities rather than measuring the time necessary to make changes to core data.¹⁵⁸ US West maintains that AT&T completed this kind of analysis in less than one day.¹⁵⁹ US West contends that, because MCI was permitted to examine only one switch type, and because locations were masked, the feature that would have enabled MCI to select switching locations based on common characteristics would have been of no practical value to MCI.¹⁶⁰ US West asserts that the number of offices in the "core run" rather than the number of offices in the master file is the

¹⁵¹ MCI Opposition at 13.

¹⁵² Id. at 14-15.

¹⁵³ Id. at 13-14; August 4 Letter at 1.

¹⁵⁴ MCI Opposition at 21.

¹⁵⁵ MCI Opposition at 22-23.

¹⁵⁶ US West Reply at 11-12.

¹⁵⁷ Id. at 7 n.10.

¹⁵⁸ Id. at 8-9.

¹⁵⁹ Id. at 9.

¹⁶⁰ Id. at 7 n.10.